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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 335

FLORIDA EAST COAST RAILWAY
a Florida corporation,

Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

DEAN TOOKER,

Counsel for Respondent

P. O. Drawer 1016

Stuart, Florida 33494

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Respondent prays that the writ of certiorari prayed for by petitioner be denied.

JURISDICTION

Respondent respectfully submits that this Court is without jurisdiction because the judgment of the Supreme Court of Florida rests upon a state or non-federal ground, independent of any federal ground, adequate to support it; and respondent further submits that the jurisdiction of this Court is not invoked under 28 U.S.C. Section 1257 (3) because petitioner did not raise a substantial federal question.

QUESTIONS PRESENTED

Respondent will concede, (if this Court determines that a substantial federal question has been raised), that the questions posed by the petitioner in its brief on page 3 are substantially in conformity with the issues which this Court is asked to rule, however, respondent abhors the phrase "automatic imposition" found neatly nestled in each.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concedes that petitioner has stated the proper provisions of the United States Constitution involved.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case, except for its interpretation of the case of *Nashville, C. & St. L. Ry. v. Walters* 294 U.S. 405, found on pages 4 and 5 of its brief, and petitioner's self-serving pronouncement found on pages 6 and 7 that it had timely and properly raised Constitutional issues.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION

This Court has and should adhere to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. In the case of *Cramp v. Board of Public Instruction,* 368 U.S. 278, this Court stated:

> "Where the judgment of a state court rests upon two grounds, one of which is federal, and the other non-federal, in character, the Supreme Court of the United States is without jurisdiction to review if the non-federal ground is independent of the federal ground and adequate to support the judgment."

Petitioner has not contended that the Constitution of Florida deprives it of any rights secured by the Fourteenth Amendment. The Declaration of Rights, Section 12 of the Florida Constitution provides:

> "No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation."

And Article 16, Section 29 of the Florida Constitution provides:

> "No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of 12 men in a court of competent jurisdiction, and shall be prescribed by law."

Petitioner's rights under the Florida Constitution were completely observed and an examination of the opinion of the Supreme Court of Florida will disclose that this case has been decided on grounds not involving any federal question.

II.

A SUBSTANTIAL FEDERAL QUESTION HAS NOT BEEN RAISED

Petitioner asserts that it has raised a substantial federal question in this case worthy of review. Respondent finds this rather hard to believe in the instant case, because it is under the impression that anyone claiming a right should be obligated to place the issue fully before the courts for a complete determination. Anything short of this standard tends to trap the court into rendering a decision not complete in scope or one that can be used for purposes never contemplated by the court in the first instance.

In Florida there are statutes, which the legislature passed in exercising its police powers, that require railroads to construct and maintain crossings and to erect certain crossing signals at the sole expense of the railroad. Section 351.03, Florida Statutes, provides:

> "Every railroad company, whenever its tracks crosses a highway, shall put up large signboards at or near said crossing with the following inscription in large letters on both sides of the boards: LOOK OUT FOR THE CARS! In all incorporated cities and towns the said company shall cause the bell on the engine to be rung before

crossing any of the streets of a city or town, and their trains shall not go faster, through any of the traveled streets of the city or town than at the rate of 12 miles per hour. This requirement for posting signs shall not apply to railroad crossings having signs as required by Section 317.455."

And Section 317.455, Florida Statutes, provides:

"Every railroad company operating or leasing any track intersecting a public road at grade and falling within the purview of Section 317.454, shall place and maintain a suitable signboard on each side of the track or tracks on the right side of the highway not less than ten feet from the ground and forty inches by fifty inches, two hundred feet from the crossing, which said board shall be painted with black lettering in white background with the following inscription thereon: STOP—RAILROAD CROSSING—FLORIDA LAW; provided, that for use at nights said signboard shall be equipped with a suitable mirror reflector or of such size, color and description as may be approved by the State Road Department for use at railroad crossings, so designated that same will reflect the rays of a motor vehicle headlights; and provide further, that where railroad warning signs have already been placed, or shall hereafter be placed, at any railroad crossing by the State Road Department, said railroad company shall not be required to erect or maintain additional signs or reflectors at such crossings."

And Section 357.01, Florida Statutes, provides:

> "All railroad companies, or persons owning or operating a line of railroad, log road or tram road in the state shall build, construct, maintain and keep in good condition highway crossings at all points where said line of railroad is crossed by any public, county or settlement road or by any public street where required by the board of county commissioners or the town council; such crossings to be constructed with as little slant as practicable, so as to render easy passage over same with loaded teams."

It is apparent, therefore, that these statutes impose upon the petitioner the very burden it protests in the instant case and yet petitioner (as the record reflects) never challenged the validity or reasonableness of these statutes, nay, did it ever so much as mention them either in the trial court or the Supreme Court of Florida. What inconsistency can this be? Is respondent to believe that one who acquiesces to a particular burden on hundreds of crossings, but rebels against it on one particular crossing, has genuinely raised a constitutional question? Perhaps petitioner assumed that in the instant case the trial court and the Supreme Court of Florida were under an obligation to adjudicate its constitutional rights in the light of statutes never brought to their attention or were required to breath into the petitioner's case omitted averments. If such be true, a procedure is born that is novel indeed.

Respondent submits that the judgment of the Supreme Court of Florida could not have been different than the one rendered in this case, or else that distin-

guished court would have fallen victim to the same inconsistency of which the petitioner stands indicted. Respondent does not over look the possibility that petitioner might have been trying to sandbag the courts in this instance, thereby gaining a valuable weapon to attack the validity of Sections 351.03, 317.455, and 357.01, *supra*, at a subsequent time. Therefore, can it not be said that if the petitioner had genuinely desired to have its rights under the United States Constitution adjudicated in this case, that it was under an obligation to place all of its cards on the table, so to speak, by challenging the validity of Sections 351.03, 317.455, 357.01, all Florida Statutes, thereby placing before the courts the complete problem at hand. For these reasons respondent feels that the petitioner did not raise a substantial federal question.

III.

DECISION BELOW IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

If this Court determines that the petitioner has raised a substantial federal question, respondent submits that this Court has already answered the question and that the judgment of the Supreme Court of Florida is in accord with this Court's decisions.

The Supreme Court of Florida based its judgment on the 1897 decision rendered by this Court in the case of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226. That case is on all fours with the instant case. Then as now, a crossing was condemned (at grade) over the tracks of a railroad and it was contended that the imposition of the cost to construct and main-

tain the crossing and the expense of installing and maintaining signal devices was taking of property without due process of law and an unlawful burden on interstate commerce. This Court stated:

> "The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute.
>
> "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated, —if all that should be required,—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed, to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people."

Petitioner contends that this decision is outmoded and does not apply to present day conditions. In this assertion the petitioner relies on the case of *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935).

Since petitioner relies heavily upon the principle that old age is the villian in this case, the respondent will pursue this course of reasoning and up-date the principle of the Chicago Case to (what is sincerely hoped) an acceptable age. This Court then rendered a decision in 1920 in the case of *Erie Railroad Co. v. Board of Public Utility Comrs.*, 254 U.S. 394, concerning grade separations. In this case the railroad was ordered to make 15 grade separations in the city of Paterson, New Jersey. The railroad protested upon the following grounds: that the costs would be prohibitive; that the changes would only be for public convenience; that it was an unwarrantable interference with interstate commerce, (these 3 reasons are also advanced in the present case); and finally that the streets were laid out later than the railroad's establishment and therefore place an unfair burden on it. In answer to these contentions this Court held:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent.

> Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

The next decision in point of time came in 1953 when this Court decided the case of *Atchison, Topeka & S. F. R. Co., v. Public Util. Com.*, 346 U.S. 346. In this case the railroad insisted that the allocation of grade separation costs should be imposed only on a benefit received basis and anything short of this was taking of property without due process of law and placed an unconstitutional burden upon interstate commerce, (exactly the same points raised in the

present case). The railroad introduced a great deal of evidence to the fact that it would receive no benefits from this grade separation; that the improvement would only facilitate traffic flow; that it was the 'revolution' in transportation that has caused the need for this type of improvement; and the severe competition the railroads are forced to endure by motor vehicles utilizing the public streets and highways. Respondent would point out here that petitioner, in the instant case, introduced the same type of evidence in great abundance before the trial court and more of the same can be found on pages 10 and 11 of its petition.

In any event, this Court stated:

> "Rather, in the cases at bar, the improvements were instituted by the State or its subdivisions to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, this Court has consistently held that in the exercise of the police power, the cost of such improvements may be allocated all to the railroads."

It is also interesting to note that this Court also discusses the *Nashville case* (294 U.S. 405) in this opinion and gives it an entirely different interpretation as does the petitioner herein. In fact, the Court states that the *Nashville case* is in complete harmony with the *Atchison case* and former decisions rendered by this Court on the same subject. Respondent realizes that the cases being cited usually concerned the elimination or separation of grades rather than the installation of signal devices or the construction and

maintenance of crossings, however, respondent feels that the same principle is involved.

The final case that respondent would like to mention is a 1962 decision by this Court in the case of *Goldblatt v. Town of Hempstead*, 369 U.S. 590. In this case the Town of Hempstead had an ordinance which prohibited excavations below two feet above maximum ground water level and the plaintiffs asserted that this ordinance prevented them from continuing their business, thereby taking their property without due process of law. This Court re-affirmed an 1887 opinion by stating:

> "As pointed out in *Mugler v. Kansas*, 123 U.S. 623, (1887): 'The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or the use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes is prejudicial to the public interests. . . .'"

Now it can be seen that the so-called antiquated (and, therefore, horse and buggy decision petitioner would have us believe) has been up-dated 65 years to 1962, and that throughout these years this Court has ad-

hered to the same long-established rule that a state has the inherent power, by reasonable regulations, to protect the lives and to secure the safety of its people; and such regulations do not constitute a taking of private property for a public use. In the instant case, it was the petitioner who insisted that the crossing condemned was hazardous or 'critically dangerous' (a phrase used by petitioner on many occasions), and in need of signal devices.

Respondent submits that the State of Florida has passed regulations covering this problem and that they are reasonable in application, (a fact never challenged by the petitioner). It is therefore urged by the respondent that the judgment rendered by the Supreme Court of Florida be upheld as it is in complete accord with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEAN TOOKER,

Counsel for Respondent

P. O. Drawer 1016

Stuart, Florida 33494

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Respondent to Messrs. David W. Peck and Roy H. Steyer, Counsel for Petitioner, 48 Wall Street, New York, New York, 10005, by Air Mail this 26th day of July, 1965.

DEAN TOOKER,

Counsel for Respondent

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REPLY BRIEF OF PETITIONER

DAVID W. PECK,
ROY H. STEYER,
Counsel for Petitioner
48 Wall Street
New York, N. Y. 10005

DAVID A. DONOHOE,
SULLIVAN & CROMWELL,
Of Counsel

August 9, 1965

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